Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

No. 92-1545

In The

Supreme Court of the United States

October Term, 1992

DEAN A. FITZGARRALD AND
PHYLLIS FITZGARRALD,

Petitioners,

v.

CITY OF IOWA CITY, IOWA, AND
JOHNSON COUNTY, IOWA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF FOR THE RESPONDENT CITY OF IOWA CITY, IOWA IN OPPOSITION

David E. Brown
Hayek, Hayek & Brown
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240
(319) 337-9606

Attorney for Respondent
City of Iowa City, Iowa

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Reasons Why the Petition Should Be Denied 6

Argument 6, 10

Conclusion 13

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Dolezal v. City of Cedar Rapids, 209 N.W.2d 84 (Iowa 1973) 7

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed. 2d 868, 102 S. Ct. 3164 (1982) 9

Lucas v. South Carolina Coastal Council, 505 U.S. ___, 120 L.Ed. 2d 798, 112 S. Ct. 2886 (1992) 6, 8

United States v. Causby, 238 U.S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946) 9

No. 92-1545

In The

Supreme Court of the United States

October Term, 1992

DEAN A. FITZGARRALD AND
PHYLLIS FITZGARRALD,

Petitioners,

v.

CITY OF IOWA CITY, IOWA, AND
JOHNSON COUNTY, IOWA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF FOR THE RESPONDENT CITY OF IOWA CITY, IOWA IN OPPOSITION

Respondent City of Iowa City, Iowa, respectfully opposes the Petition for a Writ of Certiorari to review the opinion of the Supreme Court of Iowa rendered on November 25, 1992.

STATEMENT OF THE CASE

The Petitioners (hereinafter referred to as "Fitzgarrald") own approximately 10 acres of property located northwest of Runway 6-24 of the Iowa City Municipal

Airport. When Fitzgarrald purchased this property in the 1940's, the Iowa City Municipal Airport was already in existence and operating. Besides building a home on this land, Fitzgarrald also owns and operates a mobile home park and has operated said mobile home park on the subject property for many years. The mobile home park is a non-conforming use under the provisions of the Johnson County Zoning Ordinance which was adopted in 1960.

In 1984, the City of Iowa City initiated a runway extension project to extend Runway 6-24. Initially, this runway was planned to be extended 1,000 feet; however, the ultimate extension of Runway 6-24 was only 355 feet.

Also, in 1984, the City of Iowa City, in conjunction with Johnson County, adopted the Johnson County/Iowa City Airport Zoning Ordinance under the authority of Chapter 329, Code of Iowa. The purpose of the Ordinance was to exercise the powers granted to municipalities under Chapter 329 relating to the restriction of airport hazards in the vicinity of airports by establishing airport overlay zones in which airport hazards and incompatible uses are prohibited.

In drafting the Airport Zoning Ordinance with Johnson County, the City of Iowa City attempted to duplicate the pre-existing Federal regulations regarding land uses and approach restrictions around Federally-funded airports, and the City attempted to be no more restrictive than said pre-existing Federal regulations. For example, the 34-to-1 approach slope restrictions found in the Johnson County/Iowa City Airport Zoning Ordinance are identical to the Federal Aviation Administration (FAA)

regulations found at 14 C.F.R. Part 77 (Pet. App. 116a-146a).

In 1990, the City of Iowa City and Johnson County amended the Airport Zoning Ordinance to coincide with the fact that Runway 6-24 was only extended 355 feet, rather than the 1,000 feet extension originally planned. This 1990 amendment resulted in a reduced impact over the Fitzgarrald property in regard to height restrictions. Under the amended Ordinance, the Fitzgarrald residence penetrated 6.9 feet into the specified approach slope. However, the amended Ordinance, like the 1984 Ordinance, allowed the Fitzgarrald's non-conforming uses to continue without alteration. Fitzgarrald continues to use the subject property today, for residential and mobile home park purposes, as it was being used before the adoption of the 1984 Ordinance and the 1990 amendment.

The Iowa District Court ruled on November 1, 1990, holding that no "taking" had occurred and denying Fitzgarrald's Petition for Writ of Mandamus (Pet. App. 42a-48a). In its Ruling, the Court noted that the "Airport Zoning Ordinance merely assimilated the FAA restrictions into a municipal code and did not tighten the restrictions on the Fitzgarrald property any more than was already done by the FAA regulations." *Id.* at 45a. The Court added that "Even if the Municipal Airport Zoning Ordinance had not been enacted, the Fitzgarralds would have to have FAA approval before they could alter the use of their property." *Id.*

The Court addressed the claim of physical invasion and held that the factual record in this case contradicted Fitzgarrald's belief that the 355 foot runway extension

had resulted in increased air traffic. In summary, the Court stated that the Fitzgarralds "purchased their property when the airport was in existence and situated immediately next to them. They began their business as mobile home court operators prior to the enactment of the Airport Zoning Ordinance and have been able to continue that use up to the present time. They are able to continue that use into the indefinite future. They have not intended or attempted to change the use of their property since the enactment of the Airport Zoning Ordinance. The Ordinance(s) have not had an effect on their property and have not placed any more restrictions on their land than was already in place by the FAA." *Id.* at 45a-46a.

Fitzgarrald appealed the Iowa District Court Ruling to the Iowa Supreme Court, and the Iowa Supreme Court transferred the case to the Iowa Court of Appeals. The Court of Appeals filed its decision on December 31, 1991, affirming the District Court decision by denying the Writ. The Court of Appeals held that Fitzgarrald was not entitled to a Writ of Mandamus because Fitzgarrald continued to use the property as before and had not applied for a variance available under the Ordinance; accordingly, the Court held that the matter was not ripe for determination. (Pet. App. 55a).

Fitzgarrald applied for further review to the Iowa Supreme Court. The City of Iowa City and Johnson County also sought further review of the Court of Appeals decision because, despite the Court's affirmance of the lower court ruling, the Court of Appeals found that there had been a "taking". The Iowa Supreme Court granted the respective applications for further review. On June 17, 1992, the Iowa Supreme Court filed a ruling

vacating the Court of Appeals decision and affirming the Iowa District Court ruling denying the Writ of Mandamus (Pet. App. 59a). The Iowa Supreme Court addressed the Fitzgarrald claims of regulatory taking and physical invasion. In regard to the regulatory taking claim, the Court noted that Fitzgarrald made the same use of the property both before and after the enactment of the Ordinance. The Court found that Fitzgarrald failed to demonstrate that other feasible uses of the property would be available to them or to a potential buyer, absent the challenged Airport Zoning Ordinance. *Id.* at 65a-66a. The Court stated "We are unable to conclude that the Airport Zoning Ordinances upon which Plaintiffs' 'taking' claim is based have frustrated any investment backed expectation for the use of their land." *Id.* at 66a.

In regard to Fitzgarrald's physical invasion claim, the Court noted the finding of the District Court that there were fewer flights over the Fitzgarrald property after the runway extension was completed than there were before that project was initiated. The Iowa Supreme Court also stated that the record was devoid of any evidence showing either the frequency or approximate altitudes of planes flying over the Fitzgarrald land. *Id.* at 69a. The Court added that although Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. *Id.* The Court went on to state that perhaps the most significant fact for the purposes of Fitzgarrald's physical invasion claim was that the loss of value evidence presented by Fitzgarrald related entirely to the regulatory taking claim. *Id.* at 69a-70a. The Court noted that none of the witnesses at trial testified that

overflying aircraft adversely affected the market value of the Fitzgarrald property.

On June 30, 1992, Fitzgarrald filed a Petition for Rehearing in the Iowa Supreme Court. On October 2, 1992, the Iowa Supreme Court granted Fitzgarrald's Petition for Rehearing and withdrew its prior opinion.

The Iowa Supreme Court issued its final opinion in this case on November 25, 1992, again affirming the District Court and vacating the decision of the Court of Appeals. The Court again rejected the claims of regulatory taking and physical invasion, using language nearly identical to that found in the June 17, 1992 decision. (Pet. App. 1a-12a). In support of its denial of the Fitzgarrald claims, however, the Court frequently cited the recent United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed. 2d 798, 112 S. Ct. 2886 (1992).

Fitzgarrald filed another Petition for Rehearing on December 9, 1992. The Court denied that Petition by Order dated December 23, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE IOWA SUPREME COURT CORRECTLY APPLIED FEDERAL LAW IN DENYING PETITIONERS' PHYSICAL INVASION CLAIM.

In regard to Petitioners' physical invasion claim, the Iowa Supreme Court, in the Ruling filed November 25, 1992, concluded that there was a deficiency of proof as to the element of "measurable decrease in market value"

due to overflying aircraft. (Pet. App. 9a). In so holding, the Iowa Supreme Court found that the District Court correctly rejected Petitioner's physical invasion claim, and the Court of Appeals erred in concluding otherwise.

Petitioner now argues to this Court that the Iowa Supreme Court interpreted Federal law in a manner inconsistent with prior decisions of this Court in denying the physical invasion claim. Petitioner argues that the Iowa Supreme Court applied the wrong standard in concluding that the Petitioner failed to generate a fact question on the physical invasion claim.

A careful reading of the Iowa Supreme Court Ruling of November 25, 1992, shows that the Court did apply the proper standard of law in holding that there was no "taking" by physical invasion. Based on the factual record in this case, the Iowa Supreme Court correctly concluded that the Petitioners failed to meet the requisite burden of proof to establish their claim of physical invasion in the context of a mandamus action.

In its decision, the Iowa Supreme Court noted that it had previously recognized mandamus as a procedural device to compel condemnation of an avigation easement. See, *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84 (Iowa 1973). In that prior decision, the Iowa Supreme Court recognized that an avigation easement may be required when flights are so low and so frequent as to amount to a taking of property. The Iowa Supreme Court went on to note, however, that every noise or interference with property as a result of overflying aircraft does not constitute a taking and that land owners must endure "some level of inconvenience, discomfort, and loss of peace and quiet

that can be reasonably anticipated by members of a progressive society." (Pet. App. 6a).

The Iowa Supreme Court stated that although some courts have concluded that the issue of whether a taking has occurred in airport overflight cases is an issue of law for the mandamus court to decide in the first instance, the better rule is that the mandamus court should only determine whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value. (Pet. App. 7a). It was this standard that was applied by the Iowa Court in this case.

In its Ruling, the Iowa Supreme Court cited this Court which observed in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed. 2d 798, 812, 112 S. Ct. 2886, 2893 (1992):

> No matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion]. (Pet. App. 7a).

A permanent physical invasion is one of two discreet categories of regulatory action which this Court has deemed compensable without case-specific inquiry into the public interest advanced in support of the restraint. *Id.* The second situation in which this Court has found categorical treatment appropriate is where regulation denies all economically-beneficial or productive use of the land. *Id.* at 813.

This Court's holding in *Lucas* in regard to permanent physical invasion is a refinement of prior decisions,

including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed. 2d 868, 102 S. Ct. 3164 (1982), in which this Court determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking. Also, this Court had previously held that in some circumstances, overflying aircraft may amount to a physical invasion. *United States v. Causby*, 238 U.S. 256, 261, 66 S. Ct. 1062, 1065, 90 L.Ed. 1206, 1210 (1946).

The Iowa Supreme Court accepted these principles of law and therefore accepted Petitioners' argument that, on their physical invasion claim, they were not required to try their eminent domain case in full in the mandamus action; rather, they were only required to present enough evidence to generate a fact issue as to whether the overflying aircraft produced a measurable decrease in property value. (Pet. App. 8a).

Since mandamus is an equitable action, the Iowa Supreme Court's review in this case was de novo. In its Ruling, the court stated that the record was devoid of any evidence showing either the frequency or approximate altitudes of planes flying over Petitioners' lands; the court also noted that Defendants presented evidence that planes were taking off and landing with approximately the same frequency and altitude before and after the runway extension and that three pilots, who testified for Defendants, indicated that after the runway was extended, they altered their approach turns so as to stay farther away from Petitioners' property. (Pet. App. 9a).

In contrast to this evidence, the court noted that although Petitioner Phyllis Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. Further, the court noted that it was perhaps most significant that the only loss of value evidence presented by Petitioners was related entirely to Petitioners' regulatory taking claim, not to the physical invasion claim. *Id.* at 9a.

The Iowa Supreme Court, based on its review of the record in this case, was correct to conclude that there was a deficiency of proof as to the element of "measurable decrease in market value" allegedly due to overflying aircraft. *Id.* Based on the factual record in this case, the Iowa Supreme Court correctly applied federal law consistent with prior decisions of this Court in affirming the District Court's rejection of Petitioners' physical invasion claim.

II. PETITIONERS' APPLICATION FOR LIMITED REMAND IS RENDERED MOOT BY THE IOWA SUPREME COURT'S REJECTION OF PETITIONERS' REGULATORY TAKING CLAIM.

Prior to the April 6, 1992 oral argument before the Iowa Supreme Court, Petitioners filed an Application for Limited Remand (Pet. App. 147a). This Application for Limited Remand was based upon a letter, dated March 24, 1992, to Petitioners' attorney from Terry Bolerjack, Acting Manager in the System Management Branch of the Federal Aviation Administration in Kansas City, Missouri. Petitioners contend that certain information in said letter

constitutes "new evidence" in support of Petitioners' regulatory taking claim. Petitioners are apparently interpreting certain statements in said letter to mean that Petitioners would never be able to engage in new construction on their property which would penetrate the 34-to-1 approach slope.

In the first place, the Bolerjack letter (Pet. App. 150a-151a) does not specifically address the Petitioners' property, and Respondent submits that the Petitioners are taking this letter out of context in an attempt to buttress their claim. The Respondent City of Iowa City clarified the context in which the Bolerjack letter was written by filing with the Iowa Supreme Court an Answer to Petition for Rehearing on August 11, 1992. (Resp. App. 1). In connection with its Answer to Petition for Rehearing, the Respondent City of Iowa City submitted a more-recent letter, dated August 5, 1992, from the Federal Aviation Administration to clarify certain statements made in the previous Bolerjack letter. (Resp. App. 10). The August 5, 1992 letter from the FAA notes that while the FAA would normally consider a structure that exceeded the 34-to-1 slope to be a hazard, in actual practice, there are exceptions as determined by the facts of each case. Said letter goes on to note that there is a fitness center at the approach end of Runway 6 which exceeds the 34-to-1 approach slope by five feet, but that said fitness center was not considered to have been a hazard. *Id.*

In any event, Petitioner's Motions for Limited Remand have now been ruled upon by the Iowa Supreme Court by Order filed April 19, 1993. The Iowa Supreme Court has ruled that "the Motions for Limited Remand that were filed by Appellants following our grant of

further review were rendered moot by the opinion filed in this cause on November 25, 1992, and consequently no Ruling on said Motions is required." (Resp. App. 12).

As noted in the Iowa Supreme Court Ruling of November 25, 1992, Petitioners have never submitted any application for new development of the subject property. Fitzgarrald continues to use the property as her residence and as a mobile home park which is the same use which Petitioners have made of the property for many years. Petitioners are permitted to continue making such use of their property under the Airport Zoning Ordinance. Until such time that Petitioners are denied some future development of their property because of penetration into the approach slope, it is premature for Petitioners to make any claim of "taking" based on the approach slope restrictions.

In rejecting Petitioners' regulatory taking claim, the Iowa Supreme Court correctly applied the principle set forth in the *Lucas* decision recently filed by this Court. The Iowa Supreme Court correctly concluded that the Petitioner continues to have an economically viable use of her property even though its market value may have been, to some extent, diminished as a result of the Airport Zoning Ordinance. The court correctly concluded that the alleged deprivation was much less severe than that which is required to support a constitutional taking.

CONCLUSION

For the reasons set forth above, the Respondent City of Iowa City, Iowa respectfully requests this Court to deny Fitzgarrald's Petition for a Writ of Certiorari.

Respectfully submitted,

David E. Brown
Hayek, Hayek & Brown
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240
(319) 337-9606

Attorney for Respondent
City of Iowa City, Iowa

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF IOWA

NO. 90-1845

DEAN A. FITZGARRALD and
PHYLLIS FITZGARRALD,

Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,

Defendants-Appellees.

ANSWER TO PETITION FOR REHEARING

[Filed August 11, 1992]

Per the Court's Orders of July 17, 1992 and July 31, 1992, Defendant-Appellee City of Iowa City answers the Petition for Rehearing, limited only to paragraph 4 of that Petition, and states:

1. Contrary to the Plaintiffs' claim, the FAA letter of March 24, 1992 does not show that the Plaintiffs could not have residential development on their land.

2. The Plaintiffs have taken the March 24, 1992 letter out of context; to show the context in which the March 24, 1992 letter was written, attached hereto as Exhibits "A" and "B", respectively, are copies of a November 15, 1991 letter from Christopher R. Blum to Paul V. Anderson, and a copy of the December 26, 1991 letter from William L. Meardon to Christopher R. Blum. These letters show that the FAA letter of March 24, 1992 was not written in

reference to the Fitzgarrald property; rather, it was written as a followup to the letter of November 15, 1991 in regard to an Aeronautical Study of a completely different property owned by another client of Mr. Meardon.

3. Based on said Aeronautical Study of that other property, the FAA concluded that construction on certain lots of said property would constitute a hazard to air navigation, and it was in this context that the letter of March 24, 1992 was written.

4. For the purpose of seeking clarification in this letter, the undersigned attorney for the City of Iowa City wrote a letter to the FAA, dated August 4, 1992. Attached hereto as Exhibit "C" is a copy of said August 4, 1992 letter. In response to that letter, the FAA wrote a letter to the undersigned attorney, dated August 5, 1992. Attached hereto as Exhibit "D" is a copy of the August 5, 1992 letter.

5. The August 5, 1992 letter clarifies and confirms that a structure which exceeds the 34:1 approach slope will not necessarily be determined to be a hazard. Such determination depends upon the facts in each individual case.

6. Before any such determination can be made, however, the FAA must first perform an Aeronautical Study. The August 5, 1992 letter confirms that no such study has ever been performed in regard to the Fitzgarrald property because the FAA has never received any notices of proposed construction or alteration from the Plaintiffs.

7. It is not possible to know precisely whether or how any future proposed residential use would be

impacted by the subject airport zoning ordinance. Defendant-Appellees assert that Plaintiffs will need to present a plan, permit application or through some other vehicle, suggest future development, if any is intended. Clearly, future development is not proscribed.

8. Plaintiffs' taking claim is premature. Plaintiffs have made no effort to develop their property in any way different from the way in which it has been used for years and in which it is currently being used. There is nothing in the record to show that Plaintiffs are absolutely prohibited from any future residential development of their property as a result of the airport zoning ordinance.

9. As stated in the August 5, 1992 letter from the FAA, the FAA would be happy to review any proposal or alteration by any individual wishing to develop property which requires notification under FAR Part 77 standards. A penetration of the 34:1 approach slope does not mean, in and of itself, that a future residential development proposal would be denied.

WHEREFORE, Defendant-Appellee City of Iowa City requests that the Petition for Rehearing be denied.

Respectfully submitted this 10th day of August, 1992.

/s/ David E. Brown
David E. Brown
Hayek, Hayek & Brown
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240
(319) 337-9606.

ATTORNEY FOR DEFENDANT-APPELLEE CITY OF IOWA CITY

EXHIBIT "A"

LOGO
U.S. Department
of Transportation

**Federal Aviation
Administration**

Central Region
Iowa, Kansas,
Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64106

NOV 15 1991

Mr. Paul V. Anderson
MMS Consultants, Inc.
465 Highway #1 West
Iowa City, IA 52246

Dear Mr. Anderson:

This is to acknowledge your two Notices of Proposed Construction or Alteration dated August 15, 1991, for a residential and business development southwest of Iowa City Municipal Airport, and your letter of November 11, 1991, addressed to Ms. Kathy Randolph.

We have completed our Aeronautical Studies of the proposed construction; Lot 1 under Study No. 91-ACE-0588-OE, Lots 2, 35, 22, 3, 34, and 23 under 91-ACE-0589-OE. We have determined that any construction on Lots 1, 2, 35, 3, or 34 would be a hazard to air navigation. The ground level at these lots is at or exceeds the 34:1 approach surface required for the instrument approach on file for Iowa City Municipal Airport Runway 6. On Lot 22 a structure not to exceed 4 ft. would not be considered a hazard. On Lot 23 a structure not to exceed 13 ft. would not be considered a hazard.

The elevation at the approach end of Runway 6 is 668 ft., not 681 ft. as shown in your calculations. The primary surface of the runway extends 200 ft. beyond the actual concrete surface, making your proposed construction 200 ft. closer to the runway than you calculated.

We do not consider the power line along the south side of Highway #1 a permanent structure. This line can be buried in conjunction with establishing the instrument approach to Runway 6.

This determination is subject to review if a petition is filed by the sponsor on or before December 15, 1991. In the event a petition for review is filed it should be submitted in triplicate to the Manager, Airspace Branch, ATP-240, Federal Aviation Administration, Washington, D.C. 20591, and contain a full statement of the basis upon which it is made.

This determination becomes final on December 25, 1991, unless a petition for review is timely filed, in which case the determination will not become final pending disposition of the petition. Interested parties will be notified of the grant of any review.

Sincerely,

/s/ Illegible
for Christopher R. Blum
Manager, System Management Branch

EXHIBIT "B"

MEARDON, SUEPPEL, DOWNER & HAYES
LAWYERS

122 South Linn Street

Iowa City, Iowa 52240

December 26, 1991

William L. Meardon
William F. Sueppel
Robert N. Downer
James P. Hayes
James D. McCarragher
Mark T. Hamer
Thomas D. Hobart
Margaret T. Lainson
Douglas D. Ruppert
Paul J. McAndrew, Jr.
Timothy J. Krumm
William J. Sueppel
Charles A. Meardon

Fax: (319) 338-7250
Telephone: (319) 338-9222

Mr. Christopher R. Blum
Manager, System Management Branch
United States Department of Transportation
Federal Aviation Administration
601 East 12th Street
Kansas City, Missouri 64106

Dear Mr. Blum:

Enclosed please find a copy of a letter dated November 15, 1991, addressed to Paul B. Anderson, an engineer representing one of my clients.

We have several clients who are adjacent to the property referred to in the attached letter, and we are wondering whether the contents of the attached letter are equally

applicable to other properties subject to the 34:1 approach slope.

Also, would the statement about the power line along the south side of Highway 1 be consistent in every case?

My clients are interested in developing their property, but they do not wish to spend the time and effort necessary to obtain engineering studies for a specific improvement if that improvement would be prohibited because it penetrates the approach slope or is not shielded by the power line along Highway 1.

Please let me have your statement concerning these matters as soon as reasonably possible.

Very truly yours,

/s/ William L. Meardon
William L. Meardon

WLM:seh
Enclosure

EXHIBIT "C"

HAYEK, HAYEK & BROWN
Attorneys at Law
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240-3976

Will J. Hayek (1896-1982)
John W. Hayek
C. Peter Hayek
David E. Brown

Area Code 319
Telephone 337-9606
Fax 338-7376

Lisa A. Oxley

August 4, 1992

Federal Aviation Administration
Air Traffic Division, Central Region
601 East 12th Street
Kansas City, Missouri 64106

Attn: Kathy Randolf

SENT TO FAX NO. (816) 426-2187

Dear Ms. Randolf:

I am writing in reference to a conversation you had earlier this week with Richard Blum, Chairman of the Iowa City Airport Commission.

The City of Iowa City has been involved in litigation, brought by Dean and Phyllis Fitzgarrald, regarding land adjacent to the airport. The court has ruled in favor of the City on this case, and recent affirmation of the ruling was obtained by the City in the Iowa Supreme Court. However, the plaintiffs, represented by Mr. William Meardon, have petitioned the court for a rehearing.

The basis of Mr. Meardon's petition is a letter he received from Mr. Terry Bolerjack, dated March 24, 1992. That letter was an answer to Mr. Meardon's letter of December 26, 1991, concerning a different matter. Paragraph three of Mr. Bolerjack's letter states, in part, "If we received a proposal to be located in the approach trapezoid and it exceeded the 34:1 slope, we would determine it to be a hazard . . . and proceed . . . to prevent its construction".

The specific contention raised now by Mr. Meardon appears to be that Mr. Bolerjack's statement constitutes an "up-front" prohibition of any development in all such areas.

As Mr. Blum indicated, we would greatly appreciate a clarification of the normal practices and procedures employed in such matters.

I believe Mr. Blum also indicated that we have been ordered by the Supreme Court to submit our response by Monday, August 10.

Sincerely yours,

David E. Brown

DEB:mec
cc: Richard Blum

EXHIBIT "D"

LOGO
U.S. Department
of Transportation

**Federal Aviation
Administration**

Central Region
Iowa, Kansas,
Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64106

AUG 5 1992

Hayek, Hayek & Brown
ATTN: Mr. David E. Brown
120½ E. Washington Street
Iowa City, IA 52240-3976

Dear Mr. Brown:

This is in reference to your correspondence dated August 4, 1992. In your letter you referenced our letter dated March 24, 1992, to Mr. William L. Meardon in response to general questions about his clients interest in developing their property. The third paragraph indicated that we would consider a structure that exceeded the 34:1 slope to be a hazard. While this is generally correct from a Part 77 and airport design standard, in actual practice, there are exceptions, as determined by the facts of each case.

In the Iowa City situation at the approach end of Runway 6, we have determined that some structures would not be a hazard while others would. For example there is a fitness center which exceeded the 34:1 approach slope by 5 feet. This was not considered to have a substantial adverse effect because the ground level between the fitness center and the runway exceeded by 8 feet. The

fitness center, therefore, would not have any greater adverse effect on the proposed instrument approach to Runway 6. Another proposal that we studied exceeded the 34:1 by as much as 36 feet. Since minimum descent altitudes are raised/lowered in 20 foot increments, anything that exceeded more than 20 feet would require us to raise the minimums an additional 20 feet or more. We considered this to be a substantial adverse effect and a hazard determination was issued.

As stated in our letter referenced above, we would be happy to review any proposal or alteration by any individual wishing to develop property which requires notification under FAR Part 77 standards. We have researched our files and cannot find any evidence that we have received any notices of proposed construction or alteration from Dean and Phyllis Fitzgarrald.

In conclusion, our letter of March 24, 1992, was in response to a question of general applicability. Each notice is studied on a case-by-case basis. All structures that exceed FAR Part 77 standards are presumed to be a hazard pending completion of an aeronautical study. Some are considered hazards to air navigation, others are not based on information gathered during the aeronautical study.

Sincerely,

/s/ Dale L. Illegible
for Terry Bolerjack
Acting Manager, System Management Branch

IN THE SUPREME COURT OF IOWA

No. 90-1845

ORDER

DEAN A. FITZGARRALD and
PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

(Filed April 19, 1993)

The motions for limited remand that were filed by appellants following our grant of further review were rendered moot by the opinion filed in this cause on November 25, 1992, and consequently, no ruling on said motions is required.

Dated this 19th day of April, 1993.

SUPREME COURT OF IOWA

/s/ James H. Carter
James H. Carter, Justice

Copies to:

The Hon. L. Vern Robinson
Johnson County Courthouse
417 South Clinton Street
Iowa City, IA 52240

David E. Brown
HAYEK, HAYEK & BROWN
Bremer Building
120½ East Washington St.
Iowa City, IA 52240

J. Patrick White
Johnson County Attorney
Johnson County Courthouse
P.O. Box 2450
Iowa City, IA 52244

William L. Meardon
MEARDON, SUEPPEL, DOWNER & HAYES
122 South Linn Street
Iowa City, IA 52240

Clerk of District Court
Johnson County Courthouse
417 South Clinton Street
Iowa City, IA 52240